

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-1154

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To be argued by
IRVING L. WEINBERGER

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

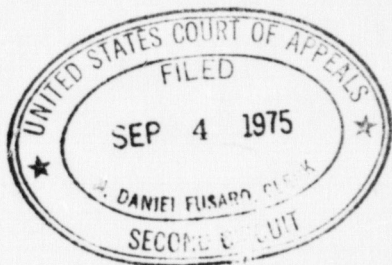
vs.

HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD,
ANTHONY SCARDINO, ALAN SEGAL and EDWARD
ZUBER,

Appellants.

*On Appeal from the United States District Court for the
Southern District of New York*

**REPLY BRIEF FOR APPELLANT, HOWARD
FINKELSTEIN, a/k/a ROBERT HOWARD**



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Appellee, :
-against- :
HOWARD FINKELSTEIN, a/k/a Robert :
Howard, ANTHONY SCARDINO, ALAN :
SEGAL and EDWARD ZUBER, :
Appellants. :

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REPLY BRIEF FOR APPELLANT HOWARD
FINKELSTEIN a/k/a ROBERT HOWARD

Statement

The government's Brief has conceded that the prosecutor, in his summation, misstated the Record in respect of the fur coat transaction by contending that Howard had executed the option agreement. Having corrected that factor in the case, the government's Brief then proceeds to misstate numerous facts relating to the fur coat transaction (Count 29). With respect to the sale of 10,000 shares to Karfunkel on February 25, 1970, the government has withdrawn all of its proof relating to Count 44 and asks the Court to sustain the conviction on the basis of a different sale which Karfunkel's firm conducted on February 2, 1970.

The Fur Coat Transaction
(Count 29)

The only evidence indicating that Howard took any part in the transaction was the fact that his signature appeared on the option agreement under the word "Witnessed" (Exhibit 63 B, JA 1543). In his summation the prosecutor argued to the jury that Howard had "executed" said agreement and had "signed" same (JA 1379-1380). The government's Brief now withdraws said contention by admitting that Howard only "witnessed" the option agreement (Brief, page 24).

The government's Brief commences its discussion of the fur coat transaction by connecting it to the Reno "sit-down". The government refuses to acknowledge that Howard was acquitted of any unlawful participation in the Reno confrontation. Accordingly, its Brief states: "When Zuber and Finkelstein returned to New York, they became interested in benefitting from the scheme and procured several fur coats in exchange for the worthless stock" (Brief, page 5).

The effect of the acquittal on the conspiracy count is to bar the government from contending that Howard benefitted from the Reno incident. Moreover the Record does not support the contention that Howard received a fur coat in exchange for Pioneer stock.

The government's description of how the fur coat transaction originated is erroneous. Gardner

testified that Howard told him that he wanted to buy a fur coat or coats for his wife and that he wished to pay therefor in stock rather than with cash. Gardner testified: "I sent them to Allen Grant who is a furrier here in Manhattan" (JA 800). In the context of the Gardner testimony the word "them" could only mean that he sent Howard and his wife to the furrier. But the government translates said testimony to mean that Gardner sent Howard and Zuber to the furrier (Brief, page 24).

Said error becomes clearer when one considers the subsequent testimony of Gardner where he stated that he called Allen Grant and told him that "this fellow" would come up to negotiate the purchase of a fur coat. Gardner's testimony did not mention Zuber (JA 801). Nevertheless, the government's Brief so translated the word "this fellow" as to include Zuber.

Grant's version of the appointment differs considerably from Gardner's. Grant testified that Gardner called and said he had some clients who were very big spenders; but the only name he mentioned was Zuber's, no other (JA 913).

Since Gardner mentioned only Howard, and Grant mentioned only Zuber, the government did not hesitate to contend that Gardner referred both Howard and Zuber to the furrier Grant.

At page 5 of its Brief, the government

stated unequivocally that both Zuber and Howard procured several fur coats. At page 25, the government backtracked. Far from proving receipt of a coat, the government contended: "Part of the arrangement was for Finkelstein to get a fur coat", citing JA 390. The evidence at JA 390 does not even sustain that watered-down allegation. Acton was asked: Was it the understanding that Howard was to receive one of these coats from Grant? Acton responded: "He was to receive something, yes sir". (JA 390).

By this ingenious misstatement of the evidence, the government is able to conclude that there is abundant evidence to support Howard's conviction on Count 29. (Brief, pp. 82-83).

The Sale of 10,000 Shares to Karfunkel
(Count 44)

The government's proof under Count 44 was submitted to sustain the allegation in paragraph Four of the Conspiracy Count which stated that Howard delivered to Karfunkel, the co-conspirator, 10,000 shares of Pioneer stock on February 24, 1970 (JA 14). But the item which went through the mails was alleged to have been sent on February 2, 1970 to Karfunkel's firm, Economic Planning Corp. (Count 44, JA 21-22).

The government's Brief resolves this problem by withdrawing all of its proof in respect of the Howard sale to Karfunkel of 10,000 shares on February 25th.

The government now contends that Howard was properly convicted of having participated in a directed trade of 3500 shares through Economic Planning Corp. at Segal's behest, (citing JA 1050).

Unfortunately the jury convicted Howard of selling 10,000 shares to Karfunkel on February 25th, not of participating in a directed trade on February 2nd. The government is quite ambivalent on which transaction it would like to have this Court affirm the conviction. At page 5 of its Brief it states that in order to derive a benefit from the Reno confrontation, Zuber and Howard procured several fur coats. Then Howard himself further entered a direct sale of the stock with Karfunkel.

The proof at JA 1050 had nothing to do with the sale of 10,000 shares to Karfunkel and it made no mention that Howard participated in the directed trade. It shows that on February 2, 1970, Karfunkel conducted a directed trade for Economic Planning Corp. on instructions from Segal. He bought 3,500 shares from one brokerage firm at 2 1/2 and sold them to another firm for 2 7/8.

The government supported its proof of the sale of 10,000 shares to Karfunkel with documentary evidence. Checks delivered in payment of said stock were received in evidence (JA 1532-1536). On February 25, 1970, Howard signed a receipt acknowledging the down payment of \$4,500 (JA 1532). Karfunkel testified that the trans-

action commenced on that very day, February 25, 1970 (JA 1053-1054).

The appellant Howard was given no advance knowledge that the government would withdraw all of its proof in respect of the 10,000 share transaction and place its reliance upon the 3,500 share transaction of February 2, 1970. Accordingly, Howard's Main Brief raised serious questions relating to his conviction under Count 44. How could Karfunkel be considered a victim of the scheme to defraud when he was named as a co-conspirator and testified that he had conducted numerous fraudulent trades in the Pioneer stock? Did the Court err in declining to have Karfunkel's testimony reread when the jury requested same? Did the Court err when the jury's note stated the date of the Karfunkel transaction as February 4th, and no effort was made to clarify that matter?

The second question which the jury submitted was whether it must view Karfunkel as two separate persons, one of them a guilty broker conducting directed trades on behalf of Economic Trading Corp. and the other, an innocent victim who was induced to purchase 10,000 shares in his own right by means of the fraudulent representations of Howard. Did the Court err in failing to provide the jury with any guidance on that issue and instructing it that it must rely exclusively upon its own recollection?

The government has now eliminated all of the

foregoing issues from this appeal. It informs the Court that it does not seek affirmance of the conviction on the basis of the proof of the 10,000 share transaction, but of the 3,500 share transaction on February 2, 1970.

While there is no proof whatever that Howard participated in the 3,500 share directed sale, the government contends that there was ample basis for the jury to convict him of that crime even though it was considering his behavior in an altogether different and unrelated transaction. The circumstantial evidence supporting the inference of guilt are the following items: the Reno "sit down", of which Howard was acquitted; the fur coat transaction, in which Howard was present but did not participate; and the 10,000-share sale to Karfunkel, of which there was evidence which the government has now withdrawn.

CONCLUSION

THE CONVICTION OF HOWARD ON COUNTS
29 and 44 SHOULD BE REVERSED

Respectfully Submitted,
FREDERIC NEWMAN
Attorney for Appellant
Howard Finkelstein, a/k/a
Robert Howard

IRVING I. WEINBERGER,
of Counsel

COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

UNITED STATES OF AMERICA,

Appellee,

- against -

HOWARD FINKELSTEIN a/k/a/ ROBERT HOWARD,
et al.,

Appellants

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Eugene L. St. Louis *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083

That on the 4th day of September 19 75 deponent served the annexed

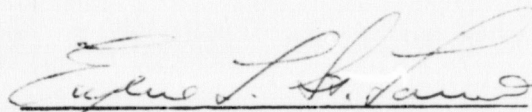
upon ~~Reply~~ Reply Brief
Kirshner & Greenberg

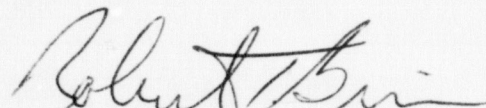
attorney(s) for

in this action, at 10850 Wilshire Blvd., Los Angeles, Cal. 90024

the address designated by said attorney(s) for that
purpose by depositing ² a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 4th
day of September 19 75


Print name beneath signature
EUGENE L. ST. LOUIS


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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etal.,

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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, Victor Ortega, *being duly sworn,*
 depose and say that deponent is not a party to the action, is over 18 years of age and resides at
 1027 Avenue St. John, Bronx, New York

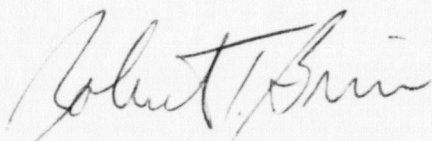
That on the 4th day of Sept 1975 at 1) 1 St. Andrews Plaza, N.Y., N.Y.
 2) ~~XXXXXXX~~ 630 Fifth Ave, N.Y., N.Y.
 3) 36 W. 44th Street, N.Y., N.Y. upon

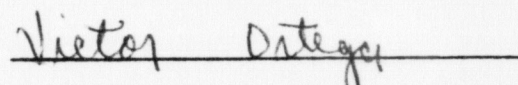
deponent served the annexed Reply Brief

- 1) Paul J. Curran
- 2) Anderson Russell Kill & Olick
- 3) Eleonore Jackson Piel

the ² ~~in this action~~ by delivering ^{es} a true copy thereof to said individual
 personally. Deponent knew the person so served to be the person mentioned and described in said
 papers as the Attorney(s) herein.

Sworn to before me, this 4th
 day of September 19 75




 VICTOR ORTEGA

ROBERT T. BRIN
 NOTARY PUBLIC, State of New York
 No. 31-0418950
 Qualified in New York County
 Commission Expires March 30, 1977